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No. 90-591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM B. YOUNG, JR., et al.,
Petitioners,

v.

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY AND ROBERT KILEY IN OPPOSITION

Of Counsel:

STEVEN LIEBERMAN
KEVIN THURM
CAHILL GORDON & REINDEL
(a partnership including professional corporations)
80 Pine Street
New York, New York 10005

SUSAN E. WEINER
Deputy General Counsel
METROPOLITAN TRANSPORTATION AUTHORITY
347 Madison Avenue
New York, New York 10017

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record

November 8, 1990

Question Presented

Whether it is inconsistent with the First and Fourteenth Amendments for begging to be banned in the New York City subway system?

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Respondents New York City Transit Authority ("TA"), Metropolitan Transportation Authority ("MTA"), and Robert Kiley respectfully submit that a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 16, 1990 (rehearing and rehearing *en banc* denied, July 6, 1990) should not issue because no question worthy of the exercise of certiorari jurisdiction is presented and because the decision below is in all respects correct.

STATEMENT OF THE CASE

The New York City subway system is a complex underground environment consisting of 468 stations and over 6,000 cars. The system operates twenty-four hours a day and transports over 3,500,000 passengers on an average workday and 1,000,000,000 passengers annually. (A.102; Pet. App. A7)[1] The system is composed of narrow platforms, mezzanines, stairs, escalators, narrow walkways and corridors, fast-moving trains and high-power electric rails. (A.144; Pet. App. A7)

In this action, plaintiffs, William B. Young, Jr. and others ("Young"), challenge a TA rule[2] against begging and panhandling on the New York City subway system. Purportedly commenced on behalf of themselves and a class of all "homeless or needy people" who reside in the State of New York and who "are or will be" begging or panhandling on the subway system (A.172), plaintiffs allege that the TA rule against begging and panhandling violates their rights under the First and Fourteenth Amendments to the United States Constitution.

The specific regulation challenged by Young, 21 New York Codes, Rules and Regulations ("N.Y.C.R.R.") 1050.6, was revised and became effective on December 29, 1989.[3] The revised

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[1] References to "Pet. App. ____" are to pages of the Appendix to the Petition for a Writ of Certiorari. References to "Pet. ____" are to the Petition for a Writ of Certiorari. References to "A. ____" are to the Record on Appeal.

[2] The TA is a public benefit corporation established to operate transit facilities in the City of New York "for the convenience and safety of the public." New York Public Authorities Law ("PAL") §§ 1201, 1202 (McKinney 1982 & Supp. 1990). The TA's mandate includes the promulgation of rules "governing the conduct and safety of the public as it may deem necessary, convenient or desirable for the use and operation of the transit facilities under its jurisdiction, including without limitation rules relating to the protection or maintenance of such facilities [and] the conduct and safety of the public. . . ." PAL § 1204 (5-A) (McKinney Supp. 1990). The MTA is a public authority and public benefit corporation established by the State of New York to develop and improve mass transportation in New York City and the surrounding counties. PAL §§ 1262, 1263(1) and 1264 (McKinney 1982 & Supp. 1990). Robert Kiley is Chairman of the MTA and the TA.

[3] That regulation is reprinted in Pet. App. E1-E6.

regulation continued the TA's long-standing ban against begging and panhandling within the transit system[4] but permitted greater utilization of the system for specific non-commercial First Amendment activities, such as public speaking; distribution of non-commercial written material; artistic performances, including the acceptance of donations; and solicitation for charitable, religious or political causes.[5] (A.93-94, 97-99; Pet. App. E2)

In maintaining the prohibition against begging and panhandling on the subway system, the TA took into account problems of disorder on the subway system and passengers' increasing fears of violence on the subways. The Court of Appeals described the process engaged in by the TA as follows:

> "In 1988, the TA initiated a lengthy study-process concerning 'quality of life problems' experienced by riders in their use of the subway system. The study-process disclosed the fact that begging contributes to a public perception that the subway is fraught with hazard and danger. A research survey conducted by Peter Harris revealed that, in fact, two-thirds of the subway ridership have been intimidated into giving money to beggars. The survey also revealed that beggars are perceived to pervade the subway system, and

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[4] *See, e.g.*, 21 N.Y.C.R.R. § 1050.6(b) (1985); 21 N.Y.C.R.R. § 701.3 (1966); A.104.

[5] The regulation permitted solicitation of funds for charity on behalf of organizations that:

> "(1) have been licensed for any public solicitation within the preceding twelve months by the Commissioner of Social Services of the City of New York under § 21-111 of the Administrative Code of the City of New York or any successor provision, or (2) are duly registered as charitable organizations with the Secretary of State of the State of New York under § 172 of the New York Executive Law or any successor provision, or (3) are exempt from federal income tax under § 501(c)(3) of the United States Internal Revenue Code or any successor provision." 21 N.Y.C.R.R. 1050.6(c)(1). (Pet. App. E2)

that the ridership considers the presence of beggars as a significant problem.[6]

As another aspect of the study-process, Detective Bernard Jacobs, a twenty-four year veteran of the Transit Authority Police and initiator of the Transit Police Crime Prevention Unit, met with numerous groups of citizens and passengers. He reported that 'passengers almost always voice their concern and discomfort about the prevalence of panhandling' in the subway system. The passengers 'feel harassed and intimidated by panhandlers.' Moreover, 'it is difficult from the police perspective to draw the fine line between panhandling and extortion.' Many passengers have complained that demands for money by beggars and panhandlers include 'unwanted touching, detaining, impeding and intimidating.'

An outside consulting company retained during the study-process confirmed the reality that begging and panhandling in the subway system pose a multifaceted problem. Professor George Kelling, the president of the consulting company and an expert with extensive national and international experience in social problems, concluded that behavior such as begging generates 'high levels of fear in the passengers, thereby discouraging use of the system.' In explaining the need for rules against begging in the subway, Kelling drew a distinction between ordinary city streets and the more constrictive New York City subway system. Open city streets allow pedestrians what

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[6] Young challenges the propriety of the Court of Appeals' reliance on the Harris survey since, they contend, that survey was "never admitted as evidence; it was simply delivered to the District Court to show that a discovery dispute had been resolved." Pet. 6 n.4. Petitioners' premise is simply incorrect: the Court of Appeals relied not on the Harris survey itself but rather on the affidavit of Peter Harris (the person responsible for the survey) describing and summarizing the survey — a document that was unquestionably "admitted as evidence" by the District Court. (The Harris affidavit was included in the Joint Appendix filed with the Court of Appeals at pages 106-08.)

> sociologists term 'fate control,' or the ability to avoid and move away from an intimidating person. To the contrary, subway riders enjoy considerably less fluidity of movement and ability to control what happens to them. Whether standing in the crush of riders in a speeding subway car, waiting among the pressing masses on a platform, or swarming with the throng through a maze of mezzanines, staircases and ramps, the rider feels 'captive.' As a result, Kelling concluded, '[i]n the subway environment, begging is inherently aggressive even if not patently so.' In addition, Kelling concluded that begging not only intimidates passengers, but also 'has the serious potential of creating an accident and injuring many people.'"[7] (Pet. App. A7-8)

Young argues that "[t]he sole practical effect of respondents' total ban on begging is to prohibit begging that is both peaceful and unintrusive" because the TA could have chosen to prohibit begging "only when it was actually accompanied by antisocial behavior or occurred in the particular parts of the subway facilities where all forms of solicitation are likely to interfere with the system." (Pet. 3) However, as the Court of Appeals correctly noted, the evidentiary record reflects that the TA determined both that begging throughout the subway system was a problem that needed to be redressed and that nothing less than a total ban would remedy the serious problems caused by begging.

On January 25, 1990 the United States District Court for the Southern District of New York (Sand, J.) granted a preliminary injunction barring enforcement by the TA of the regulation at

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[7] The Kelling affidavit also noted that the homeless in the subway system are generally males afflicted with serious mental illness and suffering from alcohol or drug abuse. Kelling noted that in addition to the impact that begging by such persons has on the 3.5 million passengers who ride on the subway system on the average workday, because many persons who beg have diminished or impaired mental capacity, the subway system is a particularly dangerous place for them. During the ten-month period covered by Kelling's study, an average of six homeless persons per month died in the subway system, including fifteen persons who were struck by trains. (Pet. App. A9; A.144-45)

issue. (Pet. App. B1-43) The District Court found, first, that begging was indistinguishable from charitable solicitation and therefore was protected by the First Amendment. (Pet. App. B22) Second, the District Court held that because the TA had amended its regulations to permit expressive activity (including the solicitation of funds by charitable organizations) in certain locations within the subway system, it had created a designated public forum in which begging or panhandling must be permitted. (Pet. App. B35-37) Third, the District Court held that the TA's regulation was not a valid time, place and manner restriction because the TA had not attempted to narrowly tailor the regulation, and because there were other regulations that – in the District Court's view – could better be used to correct the problem identified by the District Court. (Pet. App. B37-40) On February 2, 1990, the District Court made its preliminary injunction permanent. (Pet. App. D1-4)

The United States Court of Appeals for the Second Circuit reversed. As an initial matter, the Court of Appeals "[a]ssum[ed] *arguendo*" for the purposes of this case that begging and panhandling constitute protected expression. (Pet. App. A25) It did so despite its "grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection," and its view that begging is better characterized as conduct than speech. (Pet. App. A16) The Court of Appeals also, as Young acknowledges (Pet. 6), assumed for the purposes of its decision that the subway system is a public forum.[8]

The Court of Appeals then addressed the question of whether the regulation at issue was content-neutral, and concluded that it was directed at the non-communicative nature of the prohibited conduct.

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[8] Although it assumed that the subway system is a public forum for the purposes of its decision, the Court of Appeals nevertheless analyzed the issue, and – quite correctly, in our view – concluded that the subway system is not a public forum. (Pet. App. A35-37)

> "There is nothing in the record to suggest even remotely that the TA's interests in stopping begging arise because the TA objects to a particularized idea or message. To the contrary, the TA regulation is simply not directed at any expressive aspect of the proscribed conduct. In fact, under the amended TA rules, the message [that a person is needy or that homelessness is a problem] may be expressly delivered. Quite apart from any particularized idea or message it might arguably possess, begging poses significant dangers to the subway system. The conduct threatens passenger well-being and safety as well as disrupts the system's smooth operation." (Pet. App. A31)

Applying both the test set forth by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968), and the time, place and manner analysis repeatedly articulated by this Court,[9] the Court of Appeals held that the TA regulation did not violate the First Amendment. (Pet. App. A25-35) The Court held that the regulation was clearly within the TA's "broad statutory mandate to promulgate rules" (Pet. App. A27), that "the regulation advances substantial government interests" (Pet. App. A27), and that the TA, "[b]ased on its experience," had concluded that the "only effective way" of advancing these interests was a total ban on begging. (Pet. App. A33)

Young's petition for rehearing and suggestion for rehearing *en banc* was denied on July 6, 1990. (Pet. App. C1-3)

SUMMARY OF ARGUMENT

The unworthiness of the case for review by this Court is demonstrated, at the outset, by the fact that the first two questions presented in the Petition were addressed by the Court of Appeals only in dictum. Nor do any of the questions purportedly

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[9] As this Court has noted, once a regulation is found to be content-neutral, the *O'Brien* standard "'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" *Texas v. Johnson*, *109 S. Ct. 2533, 2540-41 (1989)* (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984)).

raised by this case present either a conflict in the circuits or a conflict between the ruling of the Court of Appeals and any ruling of this Court. Quite to the contrary, the Court of Appeals applied the teachings of this Court and properly held that the TA prohibition against begging and panhandling in the New York City subway system was a reasonable time, place and manner regulation.

ARGUMENT

THERE IS NO CONFLICT IN THE CIRCUITS OR BETWEEN THE RULING IN THIS CASE AND ANY RULING OF THIS COURT WHICH WARRANTS PLENARY CONSIDERATION BY THIS COURT

The unworthiness of this case for review by this Court is demonstrated, at the outset, by a series of concessions that Young is obliged to make in his Petition. Despite the fact, for example, that the very first question purportedly raised by this case is whether begging is protected by the First Amendment, Young is obliged to concede that the Court of Appeals – despite its substantial doubts to the contrary – "assum[ed] for purposes of deciding the case that begging is protected 'expressive conduct.'" (Pet. 6; Pet. App. A16-20) And despite the fact that Young's second question presented relates to whether or not the New York City subway system may or may not be deemed a public forum, Young nonetheless acknowledges that the Court of Appeals – despite its evident view to the contrary – "apparently assumed for purposes of its decision that New York City's subways are a public forum." (Pet. 6) Extensive citations are hardly required for the proposition that these issues, even if otherwise of enormous significance and otherwise the basis of significant conflict within the circuits, are hardly best presented to this Court in the context of a case in which the Court of Appeals' discussion of these topics was little more than dictum.

Nor, in any event, are these two questions ones worthy of this Court's consideration. As regards the question of whether begging is more in the nature of speech or conduct – an issue as

to which the Court of Appeals concluded that "right reason" and "common sense" led to the latter conclusion (Pet. App. A20)[10] — Young offers no conflicting cases whatsoever. Indeed, so far as we are aware, no federal case (and only one state case)[11] in this nation's history has ever held that begging constitutes speech protected by the First Amendment. Reliance by Young on the fact that many states have banned begging (Pet. 9-11) is far from supportive of his position. On the contrary, it suggests nothing less than a national consensus that begging may indeed be banned and that to do so is not inconsistent with the First Amendment.

Young's contention that the ruling of the Court of Appeals is inconsistent with the rulings of this Court in a series of cases commencing with *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), is no more persuasive. In *Village of Schaumburg*, this Court held that door-to-door solicitation by organized charities was protected by the First Amendment. Reviewing its decisions concerning solicitation "by religious and charitable organizations", the Court held that regulation of such solicitation "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Id.* at 628, 632. The Court distinguished between protected solicitation for charitable causes — which involves informative and persuasive speech seeking support for

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[10] As this Court observed in *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989), quoted in part by the Court of Appeals (Pet. App. A19): "[i]t is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street, or meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Id.* at 1595.

[11] *See C.C.B. v. State*, 458 So. 2d 47 (Fla. App. 1st Dist. 1984) (apparently holding that begging constitutes protected commercial speech).

particular views – and simple solicitation for money – which does not. *Id.* at 632. The Court in *Schaumburg* expressly stated that canvassers for charitable organizations "are necessarily more than solicitors for money." *Id.* at 632. Beggars are not.

This Court's decision in *Schaumburg*, as well as its later rulings in *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), do not establish a constitutional right to beg, do not address non-organizational solicitation like begging and do not hold that the government cannot prohibit this activity, particularly in confined places where it is intimidating and generates insecurity and disorder. The *Schaumburg* line of cases simply rejected assumptions about charitable organizations' fundraising that were tied to a fixed percentage figure because fixed percentage requirements do not further the government's interests in regulating solicitation. Here, the ban against begging serves the government interest in prohibiting the very conduct that the TA has determined is injurious to the transit system and its passengers. It is the *act* of begging that causes passengers on the subways to feel intimidated and that generates disorder in the system. It is that problem, nothing more or less, that the regulation seeks to address.

Nor would the opinion of the Court of Appeals, even if it had been bottomed on the proposition that the New York subway system is a public forum, be appropriate for review. It is evident – self-evident, we would urge – that the subway's underground system of narrow platforms and walkways near to fast-moving trains and high-power electrical rails (A. 144) are hardly comparable to the *streets* to which Young compares them.[12] Nor is there any basis for this Court to overcome its

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[12] In his Petition Young now argues – for the first time – that New York Rapid Transit Law § 31(e) (McKinney 1942) designates New York City's subways as a public forum. (Pet. 17) *See People v. St. Clair*, 56 Misc. 2d 326, 328-29, 288 N.Y.S.2d 388, 392 (N.Y.C. Crim. Ct. N.Y. Co. 1968); *People v. Manning*, No. 5N038025V (N.Y.C. Crim. Ct. N.Y. Co. Sept. 10, 1985). Young is

(Footnote continued)

repeatedly expressed "reluctance" to "infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 803 (1985). That the TA permits individuals to solicit for charities on the subway system – something which it has never found to have interfered with passenger safety or comfort except in locations such as on trains or escalators – does not require the same system to permit begging which has been found to be inherently intimidating to subway users. As this Court has long since concluded, "[s]elective access does not transform government property into a public forum." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). *Accord United States v. Kokinda*, 110 S. Ct. 3115, 3121 (1990) (plurality) (Op. of O'Connor, J.) ("'[t]he government does not create a public forum by . . . *permitting* limited discourse'") (quoting *Cornelius*, *supra*, 473 U.S. at 802).

Nor do the other two questions purportedly presented by this case raise issues worthy of this Court's consideration. Young claims that there is disagreement between federal Courts of Appeals as to (1) the question of whether a regulation that distinguishes among different types of solicitation may be sustained as content-neutral; and (2) the proper interpretation of this Court's ruling in *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989). Both of these supposed disagreements are relevant, according to Young, in assessing the correctness of the conclusion of the Court of Appeals that the TA prohibition against begging in the subways is constitutional either under a time, place and manner analysis or one rooted in principles articulated in *United States v. O'Brien*, *supra*.

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wrong. Section 31, which was part of the Rapid Transit Act of 1894, relates to such matters as the approval of routes, plans and construction specifications, and the letting of contracts. This statute, adopted well before the articulation of First Amendment "public forum" law by this Court, does not designate the subways as a public forum for First Amendment purposes. In fact, the United States Court of Appeals for the Second Circuit has specifically addressed the issue of whether MTA stations are a public forum and concluded that they are not. *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767, 772-73 (2d Cir. 1984).

But Young's effort to conjure up a relevant conflict in the circuits is as unavailing as it is irrelevant. There can by now be no doubt that even if begging were deemed the equivalent of speech and even if the subway system were deemed a public forum, that the government could nonetheless "impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 109 S. Ct. at 2753 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Each of those three tests were, as the Court of Appeals held, plainly met in this case.

That the ban on begging is content-neutral is apparent on its face.[13] The ban not only applies to all who beg regardless of any speech that accompanies their begging but is not at all "justified" on the basis of that speech. In that respect, at least as much as in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the appropriate subject of regulation is not speech of which the government disapproves but the prevention of the inevitable effects of begging that the TA has determined are threatening to subway riders and thus harmful to the system. And, as in *Ward* itself, since the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys" (109 S. Ct. at 2754), the fact that this regulation has nothing to do with "message" at all is dispositive of the issue.

It is wholly unavailing, in that respect, for Young to rely on *ACORN v. Municipality of Golden*, 744 F.2d 739 (10th Cir. 1984), a case it did not even cite to the Court of Appeals, as creating some sort of relevant conflict in the circuits. *ACORN*

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[13] Indeed, Judge Meskill in his dissent below agreed "with the majority that the TA's regulation is content-neutral." (Pet. App. A47)

struck down a ban on door-to-door canvassing on the basis of the "unguided discretion" the statute gave to municipal officials to grant or deny a license to canvass. In that context, the Court rejected a time, place and manner analysis on the ground that the statute permitted exceptions for certain types of solicitation, including solicitation for a charitable organization or an organization that "otherwise provides a service so necessary for the resident's general welfare that it does not constitute a nuisance." *Id.* at 749. But here, unlike *ACORN*, the ban on begging is complete and imposed without regard to topic at all. And here, as *Ward* plainly established after *ACORN*, there is no limit imposed on expression "because of disagreement with the message it conveys." 109 S. Ct. at 2754.

Young's effort to demonstrate some relevant disagreement between the decision of the Court of Appeals in this case and the ruling of another court of appeals fares no better with respect to the second prong of time, place and manner analysis relating to "narrow tailoring." The Court of Appeals held – and Young understandably offers no disagreement with this irrefutable point – that the "'regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, *supra*, 109 S. Ct. at 2758 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). According to Young, however, a second part of *Ward*'s supposed "two-part test" was not met since the Court of Appeals did not demonstrate that the ban on begging did not "'burden substantially more speech than necessary to further the government's legitimate interests.'" (Pet. at 22 (quoting *Ward*, *supra*, 109 S. Ct. at 2758)) While it is true that the Court of Appeals did not quote this passage from *Ward*, it could hardly have been plainer in its ruling that the TA was empowered to determine that *all* begging in the subways has the baleful effects attributed to it by subway users and those who oversee the use of the subways and that it made just such a determination. (Pet. App. A33) Thus, on the facts of this case, the notion that the begging ban is overbroad is not only contrary to *Ward* itself but to the record in this case which demonstrates, as the Kelling affidavit observed, that "'panhandling leads both to more panhandling and to more aggressive

panhandling in the transit system.'" (Pet. App. A33 (quoting Kelling affidavit A.143))

Finally, reliance by Young on *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387 (D.C. Cir. 1990), to suggest a relevant conflict among the circuits is unavailing. *Turner* struck down a permit requirement in the Washington subway system ("WMATA") (after first finding it was content-neutral) on the ground that the system restricted "many incidents of free expression that posed little or no threat to WMATA's ability to provide safe and efficient transportation." 893 F.2d at 1392. Here, the record could not be more to the contrary: "based on its experience," the Court of Appeals held, "the TA obviously reached a judgment that the only effective way to stop begging in the system was through enforcement of a total ban." (Pet. App. A33) Given the significant deference afforded just that decision, *Clark v. Community for Creative Non-Violence*, 468 U.S. at 299,[14] there is no basis for maintaining that any requirement of *Ward* was not met in this case.[15]

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[14] In *Clark*, this Court held that the application of a regulation by the National Park Service to prevent sleeping in tents in a national park did not violate the First Amendment, and specifically stated that the decision by the Park Service was entitled to deference because neither the *O'Brien* nor the time, place and manner tests "assign[s] to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow[s] the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." 468 U.S. at 229 (footnote omitted). *Accord United States v. Albertini*, 472 U.S. at 689 ("[t]he validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests").

[15] Young's Petition did not put at issue the third — "alternative channels" — requirement of the time, place and manner test. Since begging is banned only in the subways, there would, in any event, be no basis for any such challenge.

CONCLUSION

The petition for a writ of certiorari should be denied.

November 8, 1990

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record

Of Counsel:

STEVEN LIEBERMAN
KEVIN THURM
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005

SUSAN E. WEINER
Deputy General Counsel
METROPOLITAN TRANSPORTATION AUTHORITY
347 Madison Avenue
New York, New York 10017